December 5, 2002

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991 – CG Docket No. 02-278, CC Docket No. 92-90, FCC 02-250

Dear Sir or Madam,

American Express Travel Related Services Company, Inc. and American Express Financial Advisors (collectively, "American Express" and "we") appreciate the opportunity to provide comments on the FCC's Notice of Proposed Rulemaking on whether to revise the rules implementing the Telephone Consumer Protection Act of 1991 (the "TCPA").

American Express Travel Related Services Company, Inc. ("TRS") and its affiliates issue American Express ® charge cards and credit cards, serve individuals with Travelers Cheques and other stored value products, help companies manage their travel, entertainment and purchasing expenses through its family of Corporate Card services, offer accounting and tax preparation services to small businesses, and provide travel and related consulting services to individuals and corporations. American Express Financial Advisors Inc. ("AEFA"), through its financial advisors and through direct and Internet channels, offers financial planning, investment advice and consulting services, securities, insurance and brokerage products, and other related products and services, provided or procured through affiliates and third parties.

We utilize telemarketing to provide our customers with timely information about products and services they may find of value. Speaking directly with our customers allows us to interact with them in "real time," respond to their questions, and recommend products that may suit their needs. We manage this process carefully to maximize our customers' satisfaction. For over twenty years, TRS has offered Cardmembers the option not to receive telemarketing calls from us.

Clearly the landscape has changed significantly in the over ten years since the Commission last visited the do-not-call issue in its original TCPA rulemaking, and the time is ripe for reevaluation of the rule. Over half the states (27 at last count) have enacted do-not-call laws varying greatly in scope, format, exemptions, fees, and fines. The rest of the states have considered legislation, with many of these almost certain to enact new laws next session. Industry groups maintain self-regulatory do-not-call lists. Finally, the Federal Trade Commission will be releasing its own initiative in the near future. The Commission raises a number of thoughtful and pointed questions about the interplay between these varying do-not-call schemes, recognizing that the regulatory environment for telemarketing has become very complex and layered over a fairly short period of time.

Although the Commission raises a number of other issues in the NPRM, our comments focus on the do-not-call proposal.

1. If It Establishes A National Do-Not-Call List, the FCC Should Use Its Authority to Preempt State Laws

In our comments to the Federal Trade Commission earlier this year, we supported the concept of a national do-not-call registry that would (i) preempt the growing patchwork of state regulations, and (ii) provide an exception to permit calls to existing customers. We make the same observations to the Commission in this proceeding. The move toward government-sponsored do-not-call lists has gained sufficient momentum that the need for one national standard has become compelling for both consumers and businesses. We therefore urge the Commission to use the authority granted to it by Congress in the TCPA to adopt a national do-not-call list that preempts the multitude of state lists. Without such preemption, we question the need for yet another do-not-call list.

The Commission has requested comment on whether there should be a bifurcated enforcement scheme, with states enforcing their own laws with respect to intrastate calls and federal law governing interstate calls. We do not think this is a workable solution. Distinguishing between intra- and interstate calls, and sorting through who is on the state but not the federal do-not-call list, would be impractical at best and would only engender confusion among businesses and consumers.

A single standard with consistent enforcement may be achieved through the FTC and FCC working together to mutually design, implement and enforce a federal do-not-call list. The Commission should consider requiring states with existing lists to merge them into the federal list so that individuals currently registered on state lists will not need to resubmit their information to ensure coverage. State regulators should continue to play a role in enforcing the federal list by providing links on their respective websites and by coordinating with the Commission to gather and respond to complaints from consumers.

The advantages of a preemptive national do-not-call list are clear:

- States benefit from the reduction or elimination of the administrative expense and burden of maintaining do-not-call lists.

- Businesses benefit from simplified compliance procedures, regulatory certainty, reduced risk of inadvertent violations, increased customer satisfaction, and enhanced accuracy of calling lists.

- Consumers benefit from "one stop shopping" and elimination of current regulatory gaps – a single national do-not-call list covering intrastate and interstate calls and applicable to common carriers, banks, and insurers as well as all other businesses will make it easier and simpler for consumers to control the calls they receive.

The Commission has inquired as to whether Congress, in enacting the TCPA, evidenced an intent to "occupy the field" with regard to telemarketing privacy regulation, thus preempting state law. We believe it has. The history of the TCPA shows that Congress acknowledged that intrusive telemarketing calls had become a national problem that warranted a national solution. The Commission was fully empowered to explore any means necessary to achieve the goal of providing consumers with protection against intrusive telemarketing calls, including a national do-not-call list. Further, it was acknowledged that state restrictions over unsolicited telemarketing "have had limited effect…because States do not have jurisdiction over interstate calls." (Senate Report No. 102-78, Oct. 8, 1991) In the NPRM, the Commission takes note of a House committee report which cited the proliferation of state legislation, including 18 bills that would have established do-not-call lists, and stated, "Under the circumstances, a substantive argument can be made that federal legislation is needed to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards….the preponderance of evidence documents the existence of a national problem and argues persuasively in favor of federal intervention balancing the privacy rights of the individual and the commercial speech rights of the telemarketer." (House Report No. 102-317, Nov. 15, 1991) This statement has become even more true over the last decade.

2. A National Do-Not-Call List Should Exempt Calls to Existing Customers

In order to fairly balance consumer and commercial interests, calls to existing customers should be exempt from a national do-not-call list. Companies should be permitted to contact individuals who have chosen to do business with them to notify them of additional products and services they offer. Prohibiting calls to existing customers inhibits consumer choice by presenting an all or nothing scenario. Consumers who do not wish to receive "cold calls" from unfamiliar companies may still wish to receive calls from companies they have chosen to do business with. Customers may not realize that in placing their number on a do-not-call list they will stop receiving such calls. In our

experience, customers appreciate receiving information about our other products and services, even if they choose not to make a purchase.

Further, a prohibition against calling current customers could unnecessarily harm customers of businesses that have a fiduciary duty to them. For example, American Express Financial Advisors, Inc. is a registered investment advisor and its financial advisors are investment advisor representatives. American Express financial advisors have a fiduciary duty to act in their customers' best interests. On occasion that duty requires our financial advisors to expeditiously contact their customers with time-sensitive information. If our financial advisors are required to first determine whether their customers are on a do-not-call list and, if so, then find alternative means of contact such as mail, customers may be deprived of time-sensitive information that could materially affect their financial situation.

As the TCPA permits an "established business relationship" exemption from the restrictions on calls using artificial or prerecorded messages, it is reasonable to apply the same standard to restrictions imposed by a national do-not-call list. The Commission has solicited comment on whether any changes are necessary to its definition of "established business relationship" ("a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." (47 C.F.R. section 64.1200(f)(4)) Absent evidence of a material abuse of this exemption, we would discourage the Commission from modifying the definition to narrowly circumscribe the degree of business relationship necessary to establish an exemption, which would compel businesses to evaluate whether the exemption applies to each type of call on a case by case basis. Rather, an exemption should be based on a commonsense reading of what constitutes a customer relationship, which is grounded in the customer's expectations.

Finally, the Commission should make clear that only calls to consumers fall within the scope of a national do-not-call list. There has been some confusion surrounding certain state do-not-call laws and whether they apply to business-to-business calls that are placed to a residential telephone subscriber who may use that line to, for example, operate a home-based business. The nature of the call, rather than the nature of the particular telephone line that is called, should be the governing factor.

3. Current Regulations Requiring Company-Specific Do-Not-Call Lists Continue to be Valid

For about ten years, the TCPA rules have required companies to honor consumers' requests not to be called again. This requirement should not be abandoned if a national do-not-call list is established. The premise upon which it was adopted – that company-specific do-not-calls lists afford consumers with the flexibility to specify which calls they

wish to receive, while leveraging existing business practices and policies – continues to be valid. As noted above, there may be a sizeable percentage of individuals who do not wish to "black out" all telemarketing calls, but wish to be assured that their preference not to be called by a specific company will be honored.

At the same time, we see no need to add further implementation requirements to company-specific do-not-call lists, such as a mandate that consumers be able to request placement on do-not-call lists through a web site or toll-free number, automatic confirmation of a do-not-call request, specified timeframe to honor requests, etc. To require companies to alter long-established compliance mechanisms would be needlessly burdensome. And, to require them to affirmatively notify consumers of the availability of the company-specific do-not-call option also seems needless at a time when consumers' awareness of their rights under laws governing telemarketing is high and continuing to grow. We should note that as a matter of policy, American Express has long provided Cardmembers with notice of their ability to decline receiving telemarketing calls from us, and a toll-free number to do so. However, each company should have the flexibility to determine how best to meet its customers' needs.

We appreciate the opportunity to provide these comments. Should you have any questions, or if we can be of further assistance, please do not hesitate to contact me at 212-640-5268.

Sincerely,

Christine C. Wrynn
Director
Legal Affairs